Office Supreme Court, U.S.
FILED
JAN 17 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1963

No. 771

PORT OF BROOKINGS; SAUSE BROS. OCEAN TOWING CO., INC.; PORT OF GOLD BEACH; and JONEL C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON,
Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and W. R. CHAMBERLIN & CO.,
Appellees.

Appeal from The United States District Court
for The District of Oregon.

STATEMENT AS TO JURISDICTION

SIDNEY TEISER
1107 Standard Plaza
Portland 4, Oregon
Counsel for Appellants Port of Brookings, Port of Gold Beach and Sause Bros. Ocean Towing Co., Inc.

LLOYD HAMMEL
Assistant Attorney General for Oregon Public Utility Commission
Salem, Oregon
Counsel for Appellant Jonel C. Hill, Public Utility Commissioner of Oregon

OF COUNSEL:
ALEX L. PARKS
DAVID P. TEMPLETON
1107 Standard Plaza
Portland 4, Oregon

JOHN M. HICKSON
Failing Building
Portland, Oregon

DAILY JOURNAL OF COMMERCE

INDEX

	Page
STATEMENT AS TO JURISDICTION	1
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	8
(a) The "Terminal Area" question	8
(1) Scope of judicial review	8
(2) The merits	10
(b) Other questions	17
CONCLUSION	23

EXHIBIT INDEX

EXHIBIT "A"	25
EXHIBIT "B"	36

TABLE OF AUTHORITIES

Cases

	Page
California v. United States, 320 US 577, 88 L.Ed. 322 (1943)	20
Central Truck Lines, Inc. v. Pan Atlantic SS Corp., 82 MCC 395 (1960)	14, 17
Commercial Zones and Terminal Areas, 46 MCC 665 (1946)	14
East Texas Lines v. Frozen Food Express, 351 US 49, 100 L.Ed. 917, 76 S.Ct. 574 (1955)	3, 9
Newtex SS Corp., Collection and Delivery Service, 273 I.C.C. 304 (1948)	14, 16
New York v. United States, 331 US 284, 91 L.Ed. 1492	20, 22
Pacific Far East Lines v. United States, 246 F2d 711 (1957)	20, 22
Pick-Up and Delivery in Official Territory, 218 I.C.C. 441 (1936)	12

Cases (Continued)

PAGE

Pick-Up of Livestock in Illinois, Iowa and Wisconsin, 238 I.C.C. 671 (June 1940) 12

Port of Redwood City et al v. American Hawaiian Steamship Company et al, 8 Fed. Car. Cas. 32,297, I & S 30515 (1951) 20, 22

Sea Land Service, Inc. v. U.S. et al, 222 F.S. 558 (1963) 14, 16

Tariffs, Embracing Motor-Truck or Wagon Service, 91 I.C.C. 539 (1923) 12

Thames River, Inc., Common Carrier Application, 250 I.C.C. 245 (1942) 14, 16

48 MCC 418 (1948 14

82 MCC 395 (1960) 14

Congressional Record Volume 86, Part 10, Page 11544 ..... 13, 14

28 USCA 1253 3

28 USCA 1336 2

28 USCA 2101(b) 3

28 USC 2325, 2284 2

46 USCA 816 19

46 USCA 815 19

49 USCA 17(9) 2

49 USC §302(c)(1) 3, 9, 11, 13, 14, 16, 17

49 USCA 905(c) 4

49 USCA 907(h) 4

No._____

In the Supreme Court of the United States

October Term, 1963

PORT OF BROOKINGS; SAUSE BROS. OCEAN TOWING CO., INC.; PORT OF GOLD BEACH; and JONEL C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON,
Appellants,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and W. R. CHAMBERLIN & CO.,
Appellees.

Appeal from The United States District Court
for The District of Oregon.

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this Statement of the basis upon which it is contended that the Supreme Court of The United States has jurisdiction on a direct appeal to review the final decree dismissing the complaint and refusing to grant permanent injunction sought by Appellants, and that the Supreme Court should exercise such jurisdiction in this case.

OPINION BELOW

The District Court delivered no written opinion or discussion of the case, but made one general finding

that "the order of the Commission dated August 29, 1962, is supported by substantial evidence and is not arbitrary or capricious." This finding was made in its order of October 28, 1963, affirming the order of the Commission and dismissing the action.

A copy of the opinion and order of the Commission dated August 29, 1962, including a copy of the Examiner's description of the area involved and referred to therein, and a copy of the Judgment and order of the court dated October 28, 1963, are marked Exhibits "A" and "B" and appended to this Statement.

JURISDICTION

The appeal herein is from a final decree made and entered by the United States District Court for the District of Oregon specially constituted under 28 USC §2325 and §2284 in this action brought pursuant to 28 USCA §1336 and 49 USCA §17(9) by plaintiffs Port of Brookings and Sause Bros. Ocean Towing Co., Inc. to enjoin the enforcement, operation and execution of an order of the Interstate Commerce Commission.

The final order and judgment appealed from was made and entered on October 28, 1963. Notice of appeal was filed in the United States District Court for the District of Oregon on November 22, 1963.

The Supreme Court of The United States has jurisdiction to review by direct appeal the order and judg-

ment complained of under the provisions of 28 USCA §1253 and §2101(b).

The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case.

East Texas Lines v. Frozen Food Express, 351, US 49, 100 L.Ed. 917, 76 S.Ct. 574 (1955).

QUESTIONS PRESENTED

The Motor Carrier Act prohibits motor carrier operations in interstate commerce without a certificate or permit from the Commission, but 49 USC §302(c)(1) exempts from the operation of the Motor Carrier Act the performance by water carriers within terminal areas of transfer, collection or delivery services. The water carriers against whom complaints were made admitted that they were engaged in motor carrier operations between Brookings, Oregon and Crescent City, California without motor carrier authority, but claimed exemption under the foregoing statute. The principal questions presented are:

(1) Whether water carriers carrying lumber out of the Port of Crescent City, California are engaged "within a terminal area in the performance of transfer, collection or delivery services" within the meaning of 49 USC §302(c)(1) in transporting by motor truck lumber

from a mill in the town of Brookings, Oregon, a distance of 30 miles over undeveloped and isolated terrain, to a port in the town of Crescent City, California?

(2) Did the Interstate Commerce Commission commit error in law in deciding that the aforementioned motor carrier operations were exempt from the provisions of the Motor Carrier Act?

(3) Did the District Court of three judges commit error in law in deciding that the aforementioned motor carrier operations were exempt from the provisions of the Motor Carrier Act?

(4) Did the aforementioned motor carrier operations of W. R. Chamberlin & Co. and Foss Launch & Tug Co. constitute a violation of the provisions of 49 USCA 905(c) prohibiting a common carrier by water from discriminating against or giving undue or unreasonable preferences to any port, port district, locality, region, district or territory [applicable with respect to the operations of Foss Launch & Tug Co.], and of 49 USCA 907(h) prohibiting a contract carrier by water from establishing rates, charges and preferences which contravene the National Transportation Policy in the same respects [applicable with respect to operations of W. R. Chamberlin & Co.]?

STATEMENT OF THE CASE

Plaintiff Sause Bros. Ocean Towing Co., Inc. is engaged in the business of transporting lumber and other products by vessel out of the Port of Brookings in Oregon to ports in Southern California and other points. It has a permit from the Interstate Commerce Commission to engage in such business. Plaintiff Port of Brookings is a municipal corporation charged with the duty and authority of controlling and improving the bays, rivers and harbors within its corporation limits and promoting the maritime and commercial interests of its port district.

W. R. Chamberlin has a permit from the Interstate Commerce Commission to transport lumber as a contract carrier by water from all ports on the Pacific Coast. Foss has a certificate to transport lumber from ports on the Pacific Coast as a common carrier. They hold no motor carrier authority. Chamberlin and Foss have never engaged in the business of transporting goods or persons by water from the Port of Brookings. Pursuant to tariff filed with the Commission which became effective July 20, 1961, Chamberlin began the transportation of lumber by motor truck from Brookings to Crescent City, California, as so-called substituted service and thence by water to southern California ports. Its traffic originated nine miles north of the Oregon-California border, 31 miles from the Chamberlin

dock at Crescent City, and 30 miles from the Crescent City municipal limits. Pursuant to a similar tariff, Foss transported lumber by motor carrier and water carrier from Brookings to southern California ports on at least one occasion.

The transportation of lumber from Brookings to Crescent City by Chamberlin has been continuous since July of 1961 and has been conducted on a daily basis in full truck or semi-trailer movements of approximately 20,000 board feet per shipment. The lumber being transported from Brookings to Crescent City by Chamberlin has been for the account of one shipper, South Coast Lumber Company whose mill is located in Brookings.

After Chamberlin began trucking from Brookings the volume of lumber moving out of the Port of Brookings dropped suddenly to about a million feet a month as compared to about 3½ million feet a month before that time. As soon as Chamberlin started motor carrier service from Brookings, South Coast Lumber Company switched from water carrier service out of Brookings to Chamberlin's motor and water carrier service. In the last five months of 1961 alone, Chamberlin transported more than 12 million feet of lumber out of Brookings by motor carrier.

The Examiners' report which was adopted by the Commission includes a succinct description of the areas

involved in the dispute. Brookings and Crescent City each have a population of under 3,000. They are isolated and small communities separated by a distance of 30 miles. The territory between the two towns is undeveloped.

The proceeding No. MC-C-3441 initially arose upon a complaint by plaintiff Sause Bros. Ocean Towing Co., Inc. against W. R. Chamberlin & Co. alleging that the latter was conducting operations by motor carrier in interstate commerce from Brookings, Oregon to Crescent City, California without motor carrier authority in violation of the provisions of the Motor Carrier Act.

In No. MC-C-3487, the Commission instituted an investigation to determine whether Chamberlin was conducting motor carrier operations in violation of the Act. In No. 33968 the Commission instituted an investigation to determine whether the rate schedules of Chamberlin and similar schedules of Foss Launch & Tug Co. were unlawful. These matters were consolidated for hearing and disposition.

The Examiner made an investigation, conducted hearings, made his report and findings, and recommended that an order be entered requiring W. R. Chamberlin and Foss to cease and desist from engaging in furnishing motor carrier services between Brookings, Oregon, and Crescent City, California. W. R. Chamber-

lin and Foss excepted to the findings and conclusions of the Examiners. Division 1 of the Commission filed its report on August 29, 1963, adopting the statement of facts of the Examiner, with some supplements, but drew different conclusions and dismissed the proceedings against Chamberlin and Foss. This action was commenced by plaintiff Sause Bros. Ocean Towing Co., Inc. and the Port of Brookings in the United States District Court for the District of Oregon to enjoin and set aside the Findings, Conclusions and Order of the Commission. W. R. Chamberlin, Jonel C. Hill, Public Utility Commissioner of Oregon, and the Port of Gold Beach intervened. The case was heard on the record made before the Interstate Commerce Commission, was orally argued on October 28, 1963, and on the same day the court entered an order and judgment dismissing the action. The only finding of the court was that the Commission's order was supported by substantial evidence and was not arbitrary or capricious.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. The "Terminal Area" question.

(1) Scope of judicial review.

The question presented is a question of law and not a question of fact, and the District Court was in error in affirming the Commission's order on the grounds

that there was substantial evidence to support the decision. We are dealing here with the legal question of whether the motor carrier operations of Chamberlin and Foss are exempt under 49 USCA §302(c)(1). If they are exempt the Commission does not have jurisdiction under the Motor Carrier Act and the Commission has no power to enjoin their motor carrier operations. If, on the other hand, they are not exempt under this section, the Commission must order them to cease and desist because the carrier has no motor carrier authority. As distinguished from a commission proceeding involving an application for a certificate to engage in transportation of goods between two or more points, this is not an area where Congress has vested the Commission with discretion.

The case most squarely in point on the issue of the scope of judicial review is *East Texas Lines v. Frozen Food Express*, 351 US 49, 100 L.Ed. 917, 76 S.Ct. 574 (1955). This was a direct appeal from a judgment of a District Court setting aside a cease and desist order by the Interstate Commerce Commission relating to transportation of fresh and frozen dressed poultry. The carrier had claimed that the such food was exempt under the Motor Carrier Act, and the Commission had ruled that it was not exempt. The District Court held that the transportation of such food was exempt. In affirming the District Court, the Supreme Court said:

> "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates. American Trucking Assoc. v. United States, 344 US 298, 310, 97 L.Ed. 337, 355, 73 S.Ct. 307. But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. See Social Secur. Board v. Nierotko, 327 US 358, 90 L.Ed. 718, 66 S.Ct. 637, 162 ALR 1445. Those limits would be passed here if the Commission were permitted to expand "manufactured" to include such incidental processing as is involved in dressing and freezing a chicken."

Accordingly, this court has ruled that a question of the applicability of a statutory exemption from the operation of the Interstate Commerce Act is a question of law. If the Commission decides that there is no exemption and issues a cease and desist order, a question of law is presented upon filing an action to enjoin the enforcement of the Commission's order. It must necessarily follow that if the Commission decides that there is a statutory exemption and refuses to issue a cease and desist order, a question of law arises upon the District Court's review of the Commission's order. The scope of review by the court is not altered by the way the question of law is decided initially by the Commission.

(2) The merits.

The motor carrier operations of W. R. Chamberlin and Foss between Brookings, Oregon and Crescent City,

California without motor carrier authority are illegal and in violation of the Motor Carrier Act unless they are exempt under 49 USC §302(c)(1) as "performance within terminal areas of transfer, collection and delivery services." As indicated in the facts set forth in the statement of the case, the volume of this traffic is substantial and if permitted to continue will undoubtedly prevent the development of the Port of Brookings as a significant port. These motor carrier operations have resulted and will result in a substantial loss to plaintiffs.

More is involved here than the right of the litigants. The public has an important stake in the outcome. The claim of exemption in this instance goes beyond anything conceived of by Congress in enacting the exempting provision of 49 USC §302(c)(1), in 1940. This section has not been interpreted by this court and its decision will be of importance in determining the limits of this exemption.

Prior to the enactment on September 18, 1940, of the section now codified as 49 USC 302(c) creating exemptions for pick-up and delivery service by motor carriers in terminal areas, the Interstate Commerce Act did not include express provisions for exemptions for terminal area operations. Nevertheless, the words "terminal area" had been used by the Commission and had developed a fixed meaning in the regulation by the

Commission of railroad carriers. In *Tariffs Embracing Motor-Truck or Wagon Service*, 91 I.C.C. 539 (1923), the Commission in determining its jurisdiction over motor carrier operations in conjunction with authorized railroad operations decided that hauls of from 14 to 28 miles in the area of New Haven were "line hauls" and not "terminal services".

In *Pick-Up and Delivery in Official Territory*, 218 I.C.C. 441 (1936) the Commission investigated the practice of pick-up and delivery services by railroad carriers and found that they were justified by the presence of motor carrier competition. In discussing the nature of such services, the Commission observed that the service is available in areas within the corporate limits of cities or towns or, in case of points not having corporation limits, within a radius of one mile from the carrier's freight station.

In *Pick-Up of Livestock in Illinois, Iowa and Wisconsin*, 238 I.C.C. 671 (June 1940) investigation was instituted by the Commission of certain rates and charges made by railroad carriers in furnishing so-called pick-up and delivery service by motor carrier with respect to livestock. This service was limited to points within a radius of 10 miles from respondent's stations. In holding that the motor carrier operations violated Part II of the Act, the Commission said at page 677:

"To treat a rural section within a 10-mile radius of a railroad station as a terminal district and the instrumentalities used in bringing that traffic to the station a "terminal facilities" would seem to require resort to a legal fiction."

The words "terminal area" and "performance of transfer, collection or delivery services" were not picked out of the air by Congress. They were taken from the administrative decisions and rulings of the Commission.

The following commentary occurred between Senators Mead and Reed in connection with the Senate discussions of Senate Bill 2009, a part of which was enacted and later codified as 49 USCA 302(c):

"MR. MEAD: Is it the intent of this legislation to exempt motor-vehicle operations within terminal areas from the regulation of the Interstate Commerce Commission, or is it intended simply to shift the responsibility of complying with the regulations from the person performing the service to the carrier from whom the service is performed?

"MR. REED: The answers to the question * * * is that terminal operations which are precisely terminal operations are now exempt from regulation, or are considered as a part of the regulation attaching to the carriers for which the service is performed. (Cites example of a railroad operating in Jersey City delivering by truck across the river) * * *.

"MR. MEAD: Would the Senator say that the status of the terminal, local or intrestate operation will remain as it now is?

"MR. REED: That is correct. • • •" Congressional Record Volume 86, Part 10, page 11544.

Since the enactment of 49 USC §302(c) there have been no significant judicial decisions on its meaning with the exception of the case of *Sea Land Service, Inc. v. U.S. et al*, 222 F.S. 558 (1963). The Commission has in a number of proceedings interpreted and applied this statute and with the exception of the instant case, the decisions of the Commission are consistent and appear accurately to reflect the intention of Congress. These earlier decisions and general rules are exparte No. MC-37 *Commercial Zones and Terminal Areas*, 46 MCC 665 (1946); 48 MCC 418 (1948); *Thames River, Inc., Common Carrier Application*, 250 I.C.C. 245 (1942); *Neutex SS Corp., Collection and Delivery Service*, 273 I.C.C. 304 (1948); and *Central Truck Lines Inc. v. Pan Atlantic SS Corp.*; 82 MCC 395 (1960). The criteria uniformly used by the Commission in all cases (with the single exception of the instant case) are set forth explicitly and clearly in the *Pan Atlantic* case. In that case several authorized motor carriers filed a complaint that the defendant was conducting extensive motor carrier operations between Tampa, Jacksonville and Miami, Florida, on the one hand and numerous inland points in Florida. Defendant contended that such motor carrier operations were conducted as collection and delivery

services within the terminal areas of their authorized operations as a water carrier. Defendant transported property by hire between Boston, New York, Philadelphia, Baltimore and Jacksonville, Tampa and Miami. Its tariff contains a list of points in Florida located in some instances 66 miles from Tampa, Jacksonville and Miami. Defendant's rates varied even though the traffic was routed through the same port.

In finding that the defendant was operating beyond its terminal area and ordering the defendant to desist, the court said at page 404:

> "• • • a terminal area of a carrier whether motor, rail, or water carrier, or a freight forwarder, may not exceed the area within which bona fide collection, delivery, and transfer, as distinguished from line-haul service, is performed. Any service which goes beyond a single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density, and the existence of some reasonably compact limit to the geographical scope of community affairs and influence, is intercommunity in character and cannot be considered as bona fide collection, delivery and transfer service."

The Commission ordered the defendant to desist from motor carrier operations beyond the boundaries of the port district at Tampa and beyond the boundary lines of the commercial zones of Jacksonville and Mi-

ami, Florida as defined in MC 37, *Commercial Zones and Terminal Areas*.

The Commission distinguished the case of *Newtex SS Corp., Collection and Delivery Service*, 273 I.C.C. 304 (1948) on the grounds that the area involved in the *Newtex* case was considered to be "historically, geographically and commercially" a single homogeneous community and on the further grounds that the entire service was performed in an area where the New York Port Authority was exercising jurisdiction, as contemplated in the *Thames River Lines, Inc., Common Carrier Application*, 250 I.C.C. 245 (1942).

An action was commenced to set aside the order of the Commission in the *Pan Atlantic* case and the action was dismissed by the United States District Court. *Sea Land Service, Inc. v. U.S. et al*, 222 F.S. 558 (1963).

With one exception, all of the decisions of the Commission before and after the enactment of 49 USC §302(c)(1) determining the terminal areas of carriers can be explained and harmonized in terms of the criteria of standards expressed by the Commission in the *Pan Atlantic* case. With one exception, the Commission has consistently ruled that a "terminal area" does not extend beyond a "single homogeneous community, identifiable as such by the factors of commercial and industrial integrity, population and business density,

and the existence of some reasonably compact limit to the geographical scope of community affairs and influences."

The one exception is the instant case. The Examiner's report in this case adopted by the Commission clearly establishes that Brookings, Oregon and Crescent City, California, do not fall within a "single homogeneous community" but are small, isolated towns separated by a distance of 30 miles. It is impossible to relate the facts of this case to the criteria or standards expressed in the *Pan Atlantic* case for a "terminal area." If the exemption applies to the facts of this case, than the exemption has no recognizable or definable geographical limits.

The decisions of the Interstate Commerce Commission, other than the decision in the instant case, set forth criteria and standards which accurately reflect the intention of Congress. In the instant case the Commission, without any adequate explanation for the change, has completely disregarded the clear intention of Congress and its own criteria and standards. Its decision is not only erroneous as a matter of law in misinterpreting and misapplying 49 USC §302(c)(1), but it is also arbitrary and capricious.

B. Other Questions.

Foss Launch & Tug Co., one of the water carrier de-

fendants involved in the proceedings before the Commission, is a common carrier. To the extent to which its pick-up and delivery service, carried on outside its "terminal area" in the Port of Crescent City, caused a diversion of traffic from appellants Port of Brookings and Port of Gold Beach, such service constituted a clear violation of Section 305(c) of the Act. That section reads in part:

> "It shall be unlawful for any common carrier by water to make, give or cause any undue or unreasonable preference or advantage to any particular person, *port*, *port district*, gateway, transit point, *locality*, *region*, *district*, *territory*, or description of traffic in any respect whatsoever; or to subject any particular person, *port*, *port district*, gateway, transit point, *locality*, *region*, *district*, *territory* or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *" (Emphasis supplied).

W. R. Chamberlin & Co., one of the water carrier defendants involved in the proceedings before the Commission (and in this proceeding) is a contract carrier. To the extent to which its pick-up and delivery service, carried on outside its "terminal area" in the Port of Crescent City, caused a diversion of traffic from appellants Port of Brookings and Port of Gold Beach, such service constituted a clear violation of Section 307(h) of the Act. That section, where relevant here, reads in part:

"Whenever, after hearing, upon complaint or its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by water, or any *rule, regulation, or practice of any such carrier affecting such minimum rate or charge*, or the value of the service thereunder, *contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this part*, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this part. * * *" (Emphasis supplied).

Section 305(c) is substantially identical to Section 3(1) of Part I of the Act [relating to common carriers by rail]; Section 216(d) of Part II of the Act [relating to motor carrier]; Section 16 of the Shipping Act of 1916 (46 USCA 815) [relating to common carriers by water not otherwise regulated by the Interstate Commerce Commission] and Section 17 of the Shipping Act of 1916 (46 USCA 816) [relating to common carriers by water in foreign commerce].

The similarity between Section 307(h) relating to *contract* carriers by water and Section 305(c) relating to *common* carriers by water, is closer than is apparent on first reading. Section 305(c) specifically proscribes undue or unreasonable preferences or discriminations; Section 307(h) does so by incorporating by reference

the national transportation policy (Section 1, Title I, 54 Stat. 899) a portion of which establishes as a criterion the encouragement of:

> "* * * the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *"

This precise question of port discrimination under Section 307(h) is one of first impression, both before this Court and other subordinate courts. Analagous questions have been before the Interstate Commerce Commission under Section 305(c) (*Port of Redwood City et al v. American Hawaiian Steamship Company et al*, 8 Fed. Car. Cas. 32,297, I & S 30515 (1951)) and before the courts under Section 3(1) (*New York v. United States*, 331 US 284, 91 L.Ed. 1492 (1943), and Sections 16 and 17 of the Shipping Act of 1916 (*California v. United States*, 320 US 577, 88 L.Ed. 322 (1943) and *Pacific Far East Lines v. United States*, 246 F2d 711 (1957)). Appellants submit that the Congressional intent to interdict undue or unreasonable preferences or discriminations by contract carriers by water under Section 307(h) is just as clear as the Congressional intent manifested with respect to railroads under Section 3(1) and with respect to common carriers by water under

Section 306(c) and Sections 16 and 17 of the Shipping Act of 1916.

Appellants submit that if the respondent carriers are permitted to extend their terminal areas — over a distance of more than 31 miles through practically isolated terrain — and across a state boundary, thus allowing a local pick-up and delivery service which is wholly unregulated, the net effect can only be the eventual destruction of the appellant ports.

As the record shows, after respondent Chamberlin began its local pick-up and delivery service out of the Port of Brookings, lumber shipments out of Brookings suddenly dropped to approximately a million feet per month as compared with 3½ million feet a month prior. In the last five months of 1961 alone, respondent Chamberlin transported more than 12 million feet of lumber out of the Port of Brookings by motor carrier and across the docks of the Port of Crescent City.

The appellant ports are relatively new commercial port areas. No doubt this development would have occurred in the normal course of events, but it was hastened in the Port of Brookings (for example) by the private port dock development inaugurated by appellant Sause Bros. Ocean Towing Co., Inc., together with the very substantial financial investment of both ports by the Corps of Engineers, the United States Coast Guard, and funds of the port districts.

No recitation of authority is required to demonstrate that port traffic channels tremendous sums of money into the area through which such traffic moves. The longshore payroll alone in the Port of Brookings was thousands each month. To the extent to which any traffic is unlawfully diverted from either of the appellant ports, such a diversion is unjustly discriminatory and prejudicial to the appellant ports and unduly and unreasonably preferential to the Port of Crescent City.

Historically, the Interstate Commerce Commission and the courts have protected ports and industrial areas from unlawful and prejudicial encroachments by carriers operating into other areas. The Commission did so in *Port of Redwood City et al v. American Hawaiian Steamship Company et al*, 8 Fed. Car. Cas. 32,297, 1 & S 30515 (1951) and the courts did so in *New York v. United States*, 331 US 284 91 L.Ed. 1492, and *Pacific Far East Lines v. United States*, 246 F2d 711 (1957).

Pacific Far East v. United States, supra, is directly in point. In that case, ocean carriers primarily operating out of California ports were "equalizing" on traffic originating in areas tributary to Pacific Northwest ports. (The process of "equalization" is nothing more than absorbing the motor freight charges from point of origin to the port of ocean shipment. By such equalization, the ocean carriers avoided expense and inconvenience in making stops in the Northwest ports).

Appellants submit that if equalization by ocean carriers is unduly prejudicial under Sections 16 and 17 of the Shipping Act of 1916, then free pick-up and delivery service (a species of "equalization") is equally prejudicial under Sections 305 (c) and 307(h) of the Interstate Commerce Act.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Court have jurisdiction of this appeal under 28 USC §§1253 and 2101(b) and the questions presented are so substantial as to require plenary consideration for their resolution.

Respectfully submitted,

SIDNEY TEISER
Counsel for Appellants Port of Brookings and Port of Gold Beach

LLOYD HAMMEL
Counsel for Appellant Jonel C. Hill, Public Utility Commission of Oregon

EXHIBIT A

No. MC-C-3441[1]

SAUSE BROS. OCEAN TOWING CO., INC.
v.
W. R. CHAMBERLIN & CO.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS McPHERSON, BUSH, AND TUCKER BUSH, COMMISSIONER:

These proceedings were heard on a consolidated record, were the subject of a single report and recommended order of the examiner, and will be disposed of here in a single report. Exceptions to the order recommended by the examiner were filed jointly by defendant-respondents, and the complainant, the intervenor, and the Commission's Bureau of Inquiry and Compliance replied. Our conclusions differ from those recommended.

In No. MC-C-3441, by complaint filed October 3, 1961, Sause Bros. Ocean Towing Co., Inc., of Portland, Oreg., alleges that W. R. Chamberlin & Co., of Portland, Oreg., is conducting motor carrier operations in interstate commerce from Brookings, Oreg., to Crescent City, Calif., without motor carrier authority in violation of Sections 206(a) or 209(a) of the Interstate Commerce

1. This report also embraces No. MC-C-3487, Chamberlin & Co.—Investigation of Operations and Practices; I.&S. No. 7774, Lumber Between Brookings, Oregon and California; and No. 33968, Substituted Service — Brookings, Oreg., to Crescent City, Calif.

Act. Defendant Chamberlin admits these allegations generally, but justifies the motor operations at Brookings as a bona fide collection, delivery, and transfer service within its terminal area of Crescent City, and as such partially exempt from regulation pursuant to section 202(c) of the act.

In No. MC-C-3487, the Commission, by order entered November 27, 1961, instituted an investigation under sections 204(c) and 304(e) of the act, to determine whether Chamberlin is or has been conducting motor carrier operations in violation of sections 203(c), 206(a), and 209(a) of the act; whether as a contract carrier by water, it had failed to establish and observe reasonable minimum rates and charges with respect to shipments originating at or near Brookings,[2] in violation of section 306(e) of the act; and, whether an order should be issued requiring Chamberlin to cancel a provision in its tariffs which purports to provide for combined truck and vessel service from Brookings in lieu of authorized all-vessel service.

In Investigation and Suspension Docket No. 7774, by order entered January 3, 1962, the Commission suspended the schedule[3] issued by Chamberlin to become

2. Chamberlin's schedule now in effect establishes rates from Brookings and "all points and places within a ten (10) mile radius thereof."

3. Suspended were the rates from Brookings, Oreg. (subject to Note 1) to Alameda, Oakland, San Francisco, Mare Island, Redwood City, Richmond, and Vallejo, Calif. No previous rate had been established between these ports.

Note 1 provides: Rates include wharfage and handling charges at Crescent

effective January 6, 1962, because there was reason to believe that, if the proposed schedule was permitted to become effective, the operations thereunder would be beyond the scope of Chamberlin's operating authority.

In No. 33968, by order entered January 3, 1962, the Commission instituted an investigation upon its own motion to determine whether Item 15[4] in a revised schedule issued by Chamberlin which became effective without protest July 20, 1961, and Item 75[5] in a revised schedule issued by Foss Launch & Tug Co. of Seattle, Wash., which became effective without protest on December 21, 1961, were unlawful.

The facts are not in dispute. We find the examiner's statement of facts, as supplemented or modified herein to be adequate, and we adopt such statement as our own. Certain facts will be restated for clarity of discussion, and we are attaching as Appendix A hereto a description by the examiner of the area involved.

Chamberlin holds a permit under Part III of the

City, Calif., on cargo originating at Crescent City, Calif., also on cargo originating at Brookings, Oreg., moving under the conditions provided in Item 15 of this tariff. Rates from Brookings, Oreg., also apply via Crescent City, Calif., moving under the conditions provided in Item 15 of this tariff. (The suspension order excepted the first 10 words of this Note.)

4 Item 15: Substituted Freight Service — In lieu of direct vessel service from Brookings, Oreg., W. R. Chamberlin & Co., may at its option substitute combined truck and vessel service from Brookings to Crescent City, Calif., thence by vessel from Crescent City, Calif., to destination.

5 Item 75: Substituted Freight Service — (a) Unless the shipper shall direct that substituted service shall not be performed, Foss Launch & Tug Co., may, at its option, substitute truck service from Brookings, Oreg., to Crescent City, Calif., thence by vessel from Crescent City, Calif., to destination. (b) When such substituted service is performed under provisions of Paragraph (a) above, the rates, rules and regulations provided in this schedule shall apply.

act authorizing transportation as a contract water carrier by self-propelled vessels of lumber and forest products between all ports on the Pacific Coast, but holds no motor-carrier authority. Pursuant to the schedule which became effective July 20, 1961, Chamberlin began the transportation of lumber by motor truck from Brookings to Crescent City, and thence by water to southern California ports. Its traffic originates at the South Coast Lumber Co., located nine miles north of the Oregon-California State line, 31 miles from the Chamberlin dock at Crescent City, and 30 miles from the Crescent City municipal limits. Although Chamberlin has a published rate by vessel from Brookings to southern California ports, it has not transported any lumber by water from that harbor for the reason that its vessels cannot operate in the shallow depth channel.

The examiner found that the maximum permissible limits of the terminal areas of Crescent City and Brookings did not exceed their respective Port Districts; that Chamberlin's tariff providing for service within 10 miles of Brookings exceeds the maximum permissible limits of its terminal area and results in unauthorized motor operations; and that the provision of defendants' tariffs which relate to substituted service are unreasonable and subject to cancellation because they are unclear and because reliance upon them would result in unauthorized operations.

Chamberlin's position (and Foss' where pertinent) is that as a contract carrier by water subject to Part III of the act authorized to provide transportation between ports in Oregon and California, it may, under section 202(c)(1), designate its terminal area within which it may perform a pickup and delivery service as an incident to its line-haul water operations. It claims that it has, in fact, designated its terminal area at the port of Crescent City to include Brookings, Oreg., and that its motor-water operations are being performed within its lawful terminal area. It urges that the examiner erred in ruling that defendants' witnesses were not qualified to explain the historical background of the Port of Crescent City, and the fact that that port handles waterborne lumber shipments from a wide area in and around Crescent City, and that area historically includes Brookings. It contends that such evidence distinguishes the instant proceedings from *Central Truck Lines, Inc., v. Pan Atlantic S. S. Corp.*, 82 M.C.C. 395.

In reply, The Public Utility Commission of Oregon stresses the fact that the alleged terminal area consists of two separate port districts, created by State law in separate states, which, it contends, negatives any single homogeneous community concept. It urges that the report and recommended order is fully supported by the record and is a proper and correct application of the law to the facts. Sause replies that the involved trans-

portation is not within the exemption of section 203(b)(8), and that there is no merit to Chamberlin's argument that such transportation is lawful because historically lumber from the Brookings area moved to the port of Crescent City for shipment to southern California ports. The Bureau of Inquiry and Compliance denies that defendants' evidence was unduly limited, and points out that defendants fail to state specifically the evidence it would have offered and the affect of the evidence on the record.

Section 202(c) of the act partially exempts from regulation those motor-carrier operations conducted by water carriers subject to Part III, within their terminal areas, in the performance of collection, delivery, and transfer services. In contrast to the commercial zones of municipalities, terminal areas are the terminal areas of carriers. In the report in *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, the terminal area of motor carriers and freight forwarders at any given municipality was defined as being coextensive with the commercial zone of that municipality. No such general rule has been promulgated with respect to the terminal areas of rail or water carriers. Therefore, questions concerning the maximum permissible limits of the terminal areas of such carriers must be determined upon the facts in each case.

Under Part I, terminal areas may be varied and ex-

tended according to the character of the commodities and the necessary pick-up operations and practices coincident to tendering the commodity for railway transportation. *Pick-Up of Livestock in Illinois, Iowa, and Wisconsin*, 238 I.C.C. 671, 248 I.C.C. 385. The Commission has also held that where a rail carrier, which was providing exempt motor carrier service under 202(c) within two contiguous terminal areas, desired to serve both areas by motor from a single station, such an operation would be a bona fide collection and delivery service within a terminal area within the meaning of section 202(c), provided a single terminal area was defined in its tariff so as to include the geographical scope of the operation. *The Delaware, Lackawanna & Western Railroad Company Extension - Corning, N. Y.*, 53 M.C.C. 614. In *Newtex S. S. Corp., Collection and Delivery Service*, 273 I.C.C. 304 (1948), the Commission said at page 310:

> It does not appear unreasonable to consider a 30-mile motor haul as a genuine collection and delivery service when performed as an incident to a 2,200-mile water haul. Moreover, it is to be observed that the territory here proposed to be established as a terminal area has voluntarily been designated by the carrier, and it may properly designate on its own volition a more extensive terminal area than we might compel it to establish. *Tariffs of Warrior River Terminal Co.*, 167 I.C.C. 640, 644.

In *Central Truck Lines, Inc., v. Pan Atlantic S. S. Corp., supra*, the Commission stated that the maximum permissible extent of a carrier's terminal area will depend largely upon the character of the community served, regardless of whether the prior or subsequent line haul is performed by motor, rail, or water. In that proceeding, it was found that the water carrier's terminal operations were unreasonable when they exceeded the commercial zone of the municipalities, or a port district defined by the State of Florida. This does not mean that a water carrier's terminal area is necessarily coextensive with the port district of the area served. It is generally not less in territorial extent than the port district, and the extent of the port district is certainly good evidence to show the reasonableness of a carrier's terminal operations. Evidence of the extent of the Port District of Crescent City is not a matter of record, but there is acknowledgment by all parties, and it was so found by the examiner, that such a district does exist. So, we have no difficulty in concluding that Chamberlin's terminal area at the ports of Crescent City and Brookings may extend at least to the territorial scope of the respective port districts, which appears to be beyond the commercial zone of each city.

As seen from the appendix attached, the entire coastal area of southern Oregon and northern California, between Crescent City and Brookings is sparsely

populated and reliance on the lumber industry is the principal means of support for these people. Crescent City has the only airport and the only oil storage terminal for the area. The evidence discloses that southern Oregon shippers contributed financially to the building of the Crescent City Port and, historically, these shippers have used this port many years for the shipment of lumber in intracoastal and foreign commerce. Many Oregon residents work at lumber mills located in California, and California residents work at similar mills in Oregon. Additionally, the Port of Brookings is not a public port and self-propelled vessels cannot safely enter its harbor.

We cannot permit the fact that two port districts are involved to influence our determination of the character of the area involved inasmuch as this area extends over two States. It is obvious from the area covered by the Port District of Brookings, 10 townships and 640,000 acres, that such a district is indicative of the special characteristics of the locality with which we are concerned. Another fact in this case which we believe merits consideration is that defendant Chamberlin holds specific commodity authority to transport lumber as a contract water carrier, and cannot participate in joint rates or interline movements with other carriers. To narrowly construe its terminal area would render its services entirely dependent on motor transportation

inasmuch as practically all sources of lumber are beyond the commercial zone of Crescent City. Such a conclusion would not only defeat one of the expressed purposes of the act — to recognize and preserve a national transportation system by water as well as its inherent advantages — but would destroy the flexibility found desirable in *Th ames River Line, Inc., Common Carrier Application*, 250 I.C.C. 245.

All things considered, we believe that the complainants have failed to establish that points beyond the commercial zones or port districts of Crescent City and Brookings are geographically, economically, commercially, and industrially separate communities completely independent of the respective ports. We conclude that the defendants have not been shown to be conducting a transportation service beyond the maximum permissible limits of their terminal areas. However, the tariffs as filed by Chamberlin and Foss do not adequately describe the operations they offer or the scope of their terminal areas. For this reason, we shall cancel the present tariffs without prejudice to the filing of tariffs in line with our conclusions.

We find that the defendant-respondents have not been shown to have been, or to be, conducting unauthorized operations in violation of section 206(a) or 209(a) of the Interstate Commerce Act, and that the complaint must be dismissed. We further find that the

investigation proceedings in No. MC-C-3487 must be discontinued; that the tariffs which are the subject of Docket No. 33968 and I.&S. No. 7774 must be cancelled without prejudice to the filing of appropriate tariffs in line with this decision.

An appropriate order will be entered.

COMMISSIONER TUCKER did not participate.

APPENDIX A

Regarding the commercial industrial; and community characteristics of the area near and between Brookings and Crescent City, the evidence shows that from Pistol River, Oreg. (about 20 miles north of Brookings) to Klamath (about 22 miles south of Crescent City) the sites of homes and business establishments are confined to a coastal area which bordered by ocean and mountains, is limited in breadth to distances ranging from a few hundred yards to 5 or 6 miles. Brookings and Crescent City (each having a population of less than 3,000) are the largest of the communities at which the usual stores, school, shops and theaters, catering to the routine needs of community or rural life, are located. There are stretches of several miles of this coastal area which are totally undeveloped. Considering the area as a totality, the manufacture of lumber is the principal commercial activity. Pistol River consists of one store and a few homes. There are no houses or industries along the narrow coastal area which extends from Pistol River to Brookings, where two large lumber mills are located. At Harbor, Oreg. (separated from Brookings only by a river which is spanned by a highway bridge) there are two more large lumber mills, and another mill operates at a point about 5 miles south of Harbor. Two additional mills are at Smith River, Calif. (about 8 miles north of Crescent City) and there are 2 more

just north of Crescent City itself, and 7 within the city. The only other sizable industry at Crescent City is an oil terminal operation, at which about 4.5 million gallons of oil and gasoline are received each month by barge from points in Washington and California. Along the road or area stretching from Crescent City to Klamath there has been no development. Two sawmills are located at Klamath. Outbound traffic from these various mills has been moved from mill sites to shipside in private carriage or by authorized motor common carriers to shipside for the most part. Chamberlin, since July, 1961, has otherwise transported considerable tonnage from the Brookings area to Crescent City in the motor service here under question. As heretofore noted Chamberlin so transported nearly 2.5 million board feet of lumber each month (on the average) during 5 months of 1961. Comparatively, the overall tonnage shipped by vessel from Brookings between November, 1959, and January 1, 1962, totals about 86 million board feet, or an average of about 6 million per month. The Port of Brookings Port District which was created in 1956, embraces 10 townships in Curry County, Oreg., a total expanse of about 640,000 acres. A portion of its revenue is derived from taxes levied on the real property within its borders, the southern end of the district extending to the Oregon-California State Line, which is about 21 miles north of Crescent City. Studies are now

being conducted to determine the extent to which the Brookings Port will be further developed. If the present privately-owned and controlled dock facilities are not converted to public facilities, the port officials intend to erect new dock facilities. The evidence shows that Crescent City also is embraced within an established Port District of undescribed size.

EXHIBIT B

Civil No. 63-189

ORDER AND JUDGMENT

It appearing to the Court that the order of the Commission dated August 29, 1962, is supported by substantial evidence and is not arbitrary or capricious,

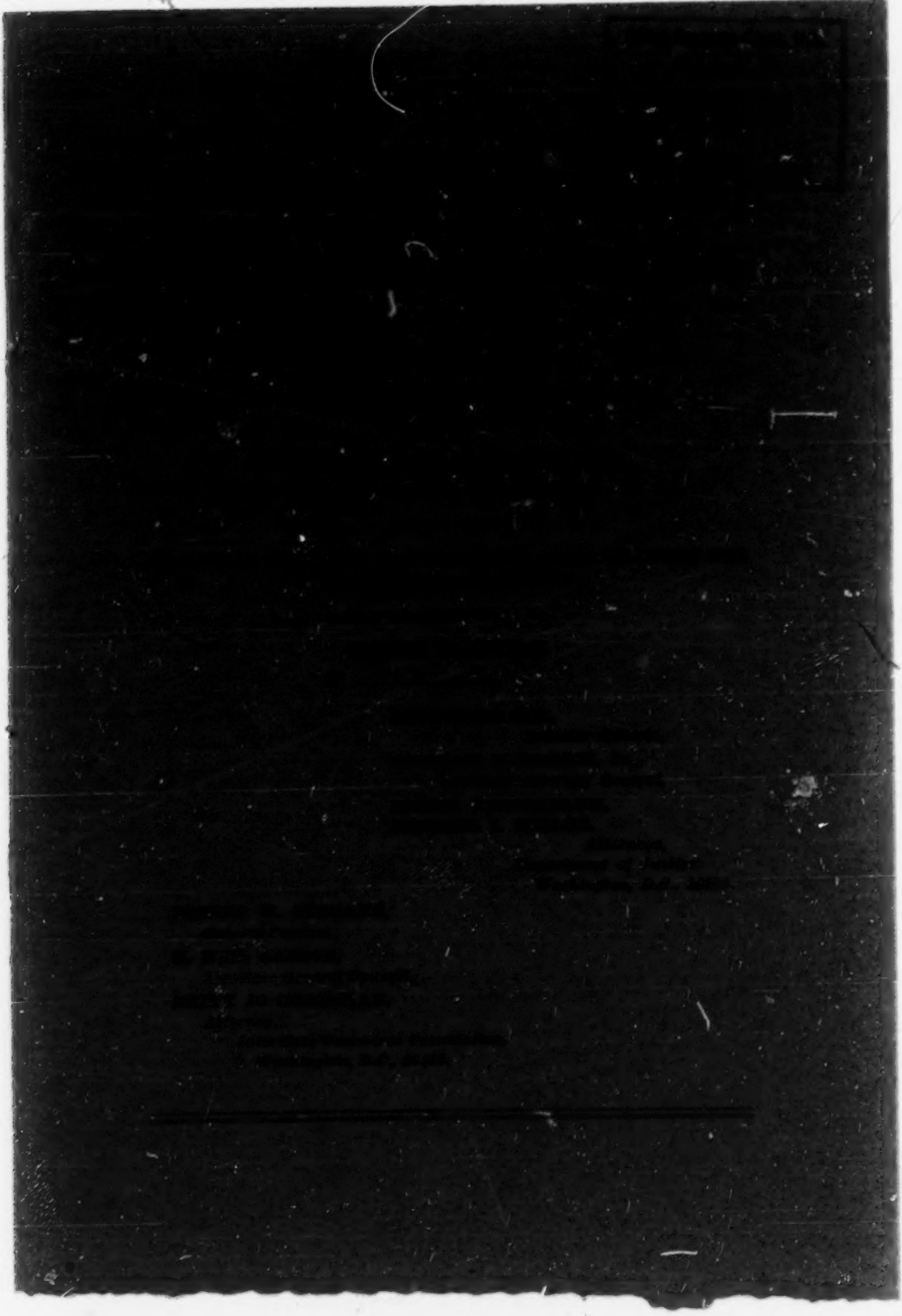
NOW, THEREFORE, the order of the Commission is hereby affirmed and this action dismissed.

Dated this 28th day of October, 1963.

Homer T. Bone
United States Circuit Judge

Gus J. Solomon
United States District Judge

John F. Kilkenny
United States District Judge



In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 771

PORT OF BROOKINGS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. Appellee, W. R. Chamberlin & Co., is a contract water carrier authorized to transport lumber from Crescent City, California, to other points. The Commission determined that appellants had failed to

721-655—64

establish that the ancillary motor carrier operations of Chamberlin between Crescent City and Brookings, Oregon, are unlawful since Brookings was not shown to be beyond the scope of Chamberlin's terminal area. The Commission's order also applied to a tariff issued by Foss Launch and Tug Co. of Seattle, Washington.

Section 202(c)(1) of the Interstate Commerce Act, 49 U.S.C. 302(c)(1), partially exempts from regulation the motor carrier operations of water carriers subject to Part III of the Act, "in the performance within terminal areas of transfer, collection, or delivery services." The Act does not define the phrase "terminal area" and the Commission has not promulgated any general rule to establish the maximum permissible limits of the terminal areas of water carriers as a group.[1] Instead, it has viewed the matter as a factual question to be determined on a case by case basis.

The present proceeding arose in October 1961, when appellant Sause Bros. Ocean Towing Co., Inc., a competitor of Chamberlin, filed a complaint with the Commission charging that Chamberlin was transporting lumber by truck from Brookings, Oregon, to Crescent City, California, without the requisite operating authority from the Commission. Chamberlin admitted conducting the described operations, but justified such operations as a bona fide collection, delivery, and trans-

[1] The Commission in *Commercial Zones & Terminal Areas*, 54 M.C.C. 21, defined the terminal areas of motor carriers and freight forwarders as being coextensive with the commercial zones of the municipalities served by them. In contrast to this, no general rule has been established to define the terminal areas of rail carriers or water carriers.

fer service within its terminal area of Crescent City. Subsequently, the Commission instituted an investigation into the lawfulness of Chamberlin's rate schedules and motor carrier operations pertaining to its terminal services at Crescent City, and the issues were determined in a consolidated proceeding.

The Commission (Division 1) concluded that the complainants had failed to establish that the Port of Brookings is not within the permissible limits of Chamberlin's terminal area of Crescent City.[2] Noting that "questions concerning the maximum permissible limits of the terminal areas of such carriers must be determined upon the facts in each case" (J.S. 30), the Commission undertook a detailed scrutiny of the geographic and economic characteristics of the region involved. The Commission found that the entire coastal area of southern Oregon and northern California is sparsely populated, with Brookings and Crescent City being the principal communities (located approximately 30 miles apart), each possessing a population of less than 3,000 (J.S. 36). The principal commercial activity is the manufacture and shipment of lumber (J.S. 36). Among the major factors which the Commission considered as indicative of the close commercial relationship between Brookings and Crescent City were that Crescent City has the only airport and only oil storage terminal for the area; that southern Oregon shippers contributed financially to the building of the port at Crescent City and have

[2] The Commission did, however, require Chamberlin to file a new tariff and schedule clearly defining the limits of their terminal area at Crescent City.

used this port for the water transportation of lumber for many years;[3] and that many residents of Oregon are employees of lumber mills in California and vice versa (J.S. 33). The Commission also noted that the Port of Brookings has no public dock facilities,[4] and that self-propelled, deep-water vessels cannot safely enter its harbor (J.S. 33),[5] while Crescent City is a deep-water port which has a large public and two private docks. The Commission pointed out that Chamberlin, as a contract carrier of only one commodity, lumber, cannot interline with motor common carriers, so that a narrow construction of its terminal area "would render its services entirely dependent on motor transportation" of others and "destroy the flexibility" of its operations (J.S. 33, 34).

On review, the three-judge district court affirmed the Commission's order, and held that the Commission's decision "is supported by substantial evidence and is not arbitrary or capricious" (J.S. 39).

---

[3] Shippers located in the Brookings area have long relied on the port at Crescent City for water transportation, hauling their lumber to the port in private carriage in most instances (Tr. 40, 44, 144, 248).

[4] Inadvertently the Commission stated that the Port of Brookings is not a public port (J.S. 33). This is not quite accurate. The port is public, but the dock facilities are privately owned and controlled by appellant Sause Bros., the only carrier which has carried lumber out of Brookings for the past five years.

[5] Admittedly some shallow draft vessels can enter the harbor, but the Commission, in referring to self-propelled vessels, obviously meant deep water vessels of the type used by Chamberlin. The record before the Commission is clear that vessels of the type used by Chamberlin cannot safely use the harbor at Brookings (Tr. 139–140).

ARGUMENT

1. The Commission has consistently viewed the precise scope of a terminal area, within which motor carriage may be conducted by a water carrier pursuant to Section 202(c), as a question of fact, to be determined on a case by case basis. Under Section 202(c)(1), a terminal area is the terminal area of a *carrier,* rather than of a city or a port. The factors which the Commission considers include the geographic, economic, and industrial characteristics of the area involved, and the nature of the carrier's authority and operations. The ultimate issue is whether, in a given factual context, a water carrier's motor operations may properly be considered as a "collection, delivery, and transfer service" incidental to its water carrier operations (J.S. 30). The unusual facts of this case, including the sparse population of the region, the undeveloped character of the Port of Brookings as compared with the port at Crescent City, and Chamberlin's status as a contract carrier of only one commodity, plainly distinguish it from the cases relied upon by appellants and justify the Commission's conclusion that Crescent City and Brookings were a common community and that Chamberlin was conducting a collection service incidental to its water carrier operations. *Sea-Land Service, Inc.* v. *United States,* 222 F. Supp. 558, 565 (D. Del.).

In analogous situations in which the Commission's adjudication of a similar claim (the territory served by an applicant for a grandfather motor certificate) has been challenged, this Court has stated that "[t]he precise delineation of the area or the specification of

localities which may be serviced has been entrusted by the Congress to the Commission." *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 480. The district court, after reviewing the record, concluded that the Commission's determination that Brookings was not shown to be beyond Chamberlin's terminal area at Crescent City "is supported by substantial evidence" (J.S. 39). There is no occasion for further review of this factual issue. *Radio Corporation of America* v. *United States*, 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

2. There is no issue of port discrimination involved in this case. The Commission's decision is limited to determining the maximum permissible terminal area of the particular carriers whose operations were challenged. Its decision is not *res judicata* as to the terminal area of other water carriers serving Crescent City, nor of a future determination of Chamberlin's terminal areas when and if the character of the region and the ports should undergo substantial changes.

Furthermore, appellants cannot show any legally cognizable injury resulting from the diversion of traffic from Brookings. Section 305(e), 49 U.S.C. 905(e), prohibits "unjust discrimination" against any port district by a *common* carrier by water. We assume *arguendo* that Section 309(g), 49 U.S.C. 909(g), by its reference to the National Transportation Policy, may similarly forbid *contract* carriers from unlawfully discriminating. These prohibitions, however, come into play only if the carrier discriminates in serving both the point preferred and the point prejudiced. See

United States v. *Illinois Central R. R.*, 263 U.S. 515; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359 (N.D. Ill.). In this case Chamberlin, while having authority to serve Brookings as a water carrier, was unable to do so because of the nature of the vessels it operated (J.S. 27–28, 33–34). In these circumstances, it is plain that the diversion of traffic from Brookings is not attributable to a discrimination effectuated by Chamberlin, but solely to its competitive efforts to draw additional traffic to the port which it serves.

CONCLUSION

For the above stated reasons, we respectfully submit that the judgment of the district court should be affirmed.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
MICHAEL I. MILLER,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission.

FEBRUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964